

August 13, 2009

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UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY
Civil Action No. 08-1271

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In Regard to the Matter of:

Bayside State Prison
Litigation

OPINION/REPORT
OF THE
SPECIAL MASTER

JOHN MARCHETTI

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

* * * *

THURSDAY, AUGUST 13, 2009

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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6 Transcript of proceedings in the above
7 matter taken by Theresa O. Mastroianni, Certified
8 Court Reporter, license number 30X100085700, and
9 Notary Public of the State of New Jersey at the
10 United States District Court House, One Gerry Plaza,
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1 JUDGE BISSELL: I am now opening
2 proceedings and the following will constitute the
3 Special Master's determination regarding the
4 complaint of John Marchetti, civil number 08-1271.

5 This opinion/report is being issued
6 pursuant to the directives of the Order of Reference
7 to a Special Master and the Special Master's
8 Agreement and the guiding principles of law which
9 underlie this decision to be applied to the facts
10 upon which it is based as set forth in the jury
11 instructions in the Walker and Mejias jury charges to
12 the extent applicable to the allegations of Mr.
13 Marchetti.

14 As finalized after review under Local
15 Civil Rule 52.1, this transcript will constitute the
16 written report required under paragraph seven of the
17 Order of Reference to a Special Master.

18 Mr. Marchetti was living in D Unit at
19 the time of the incidents in question here and his
20 unit was removed to the gym on August 11, 1997.
21 Particularly since I am determining here that Mr.
22 Marchetti has sustained his claim in this case, I'm
23 going to take the liberty of reading some fairly
24 lengthy excerpts from his testimony which I am
25 adopting as the Special Master's findings here.

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1 The first of these excerpts begins at
2 page 28, line seven and proceeds to page 30, line 18.
3 And I would ask that the court reporter in
4 transcribing this perhaps make use of the prior
5 transcript as well in order that we make sure that we
6 have an accurate recounting.

7 The question is: "Then tell us what
8 happened when you got to the gym."

9 And the answer is rather lengthy, but
10 nonetheless illuminating.

11 "Answer: When we got to the gym, we
12 were -- somebody escorted us to a position where we
13 were told to sit. We were told to sit down, keep our
14 head facing the ground. We were told we could take
15 our hands out from behind our head.

16 Then we were sitting there for a little
17 while and then somebody started yelling. I was later
18 told it was a sergeant. He started yelling he was
19 looking for somebody. At first I couldn't hear what
20 he was asking for because there was -- because of my
21 hearing loss, there was background noise in the room,
22 the air conditioners were going and it was very loud
23 and I couldn't hear. But because he kept asking the
24 same thing apparently over and over again, I knew he
25 wasn't finding what he was looking for. To me it

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1 sounded like he was asking for the person with paint
2 in their room. And we had a painter that was on the
3 unit that lived up in -- on the second floor. He was
4 the unit painter, that was his job. When they kept
5 asking for him and nobody stood up, I started getting
6 nervous and worried because of the stuff that had
7 gone on prior to that throughout the unit with the
8 officers trying to instigate fights and everything.

9 When I was sitting there, I could see
10 behind me there was a set of boots. Basically, I
11 knew it was an officer standing up, you know. So I
12 had said, excuse me, who is he looking for. I can't
13 hear what he's saying. And the officer said just
14 shut up and sit there. At this time, probably a few
15 minutes later, or 30 seconds later, sometime around
16 there, the air conditioner shut off. And the officer
17 said for the last time if the person that I'm looking
18 for doesn't stand up, then there is going to be
19 trouble. But he didn't restate what he was looking
20 for. So we sat there and apparently the person
21 didn't stand up. So he said, all right, fine, I'm
22 going to call you out one by one. When you hear your
23 name called, I want you to stand up and wait for --
24 approach the nearest officer, keep your face to the
25 ground, approach the nearest officer or wait for an

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1 officer to approach you.

2 So they started calling out names of
3 the different inmates. And the line that they were
4 calling out I recognized the inmates from my line.
5 They called the cell before mine. And then they
6 called my cellie's name and my name. McLean and
7 Marchetti. When they called my name, I stood up.
8 The officer was right behind me so I just took a step
9 back. And then other officers came around and
10 somebody quietly said, did you have a cane in your
11 room. A cane. I said yes, a cane, yes, I had a cane
12 in my room. Well, why didn't you stand up when we
13 were looking for you? I said, I told you, I couldn't
14 hear. I didn't understand what you were saying.
15 They said all right, come with me."

16 Now, the testimony then picks up, page
17 32 for a brief excerpt between lines 12 and 14.

18 "Question: What happened to you, Mr.
19 Marchetti?

20 "Answer: They led me back to the
21 weight cage and told me to kneel on the floor."

22 And then resuming at page 33, and I'm
23 going to be quoting some excerpt although not
24 continuously between pages 33 and 42.

25 "Question: So I interrupted you and I

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1 apologize. They led you to this weight cage. What
2 happened next?

3 "Answer: They told me to kneel down on
4 the floor and put my face against the mesh. I
5 wasn't -- Apparently, I was kneeling too close to the
6 cage and they told me to move my knees back so that
7 my -- so that I was at an angle. So that my weight,
8 the weight of my body, was actually resting on my
9 face which is what they wanted me to put on the mesh.

10 On the weight cage there is a probably
11 four-inch wide steel joiner piece that connects the
12 two mesh parts. And what I did was I put my head and
13 forehead against that steel piece instead of pressing
14 my face to the actual mesh of the cage. So then I
15 was kneeling there and there was officers standing
16 around me.

17 "Question: How many officers?

18 "Answer: At different times there was
19 different amounts, but there was an officer to my
20 right, an officer to my left and there was an officer
21 behind me. At one point I believe there was two
22 other officers that was standing on each side of the
23 officer that was behind me."

24 Skipping a few lines and continuing.

25 "One of the others, the officer to my

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1 left, started putting on a glove. And I could see
2 the glove that he was putting on. And by the look of
3 it I could see how it folded when he was putting it
4 on. And it was like a little puffier on the outside.
5 It's what resembled to me what I had been shown
6 previously as a lead-lined glove or a glove with lead
7 pellets in it that state police -- friend of mine
8 whose father was on the State Police had shown me
9 this glove that his dad had. I assumed it was State
10 Police typical gear.

11 He put the glove on and said so you
12 have a hearing loss. And I said yes, sir. And he
13 said which ear? And I said my left one, sir. And he
14 said this one, and he smacked me in the ear with the
15 glove.

16 "Question: How did he smack you?

17 "Answer: Backhand style, basically
18 hitting me in the head.

19 "Question: And can you estimate the
20 level of force that he used on that first smack?

21 "Answer: The first smack, it hurt.
22 Felt like my head exploded. But it wasn't like -- it
23 was hard, it didn't knock me over, though.

24 "Question: You were on your knees at
25 this time?

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1 "Answer: Yes, I was on my knees.

2 "Question: What happened next?

3 "Answer: After he asked me was it this
4 ear, I said yes, sir. He said how did you lose your
5 hearing and hit me again. This time he hit me a
6 little bit harder. Seemed like he was hitting me to
7 try to push me over. I told him a car accident. He
8 said how did you lose your hearing, was it from
9 fucking your father or was he fucking you?"

10 By the way, I might add parenthetically
11 that, of course, word as such aren't actionable here,
12 but they certainly are probative in connection with a
13 demonstration of an attitude and a state of mind of
14 the perpetrator. Continuing the quote.

15 "Question: Then he hit you?

16 "Answer: Something along those lines.
17 And then he hit me and the question just went on in a
18 degrading style like that.

19 "Question: You said the second hit was
20 harder than the first?

21 "Answer: Yes.

22 "Question: Did you fall over?

23 "Answer: No, I did not.

24 Moving ahead approximately a page now
25 at line 18 on page 37.

1 "Question: How many times were you
2 struck?

3 "Answer: There was at least five,
4 maybe a couple more than that.

5 "Question: Were they progressively
6 harder or did they remain the same after the first or
7 second blow?

8 "Answer: They got progressively
9 harder. It seemed like there was more intent to push
10 me into one of the other officers from the force.

11 "Question: And can you describe the
12 pain of the last hit?

13 "Answer: The last hit, well, my face
14 was kind of numb at that point. My ear -- and I mean
15 it hurt. Just like all the other ones. I mean I was
16 getting hit.

17 "Question: What happened after that?

18 "Answer: Sometime around one of the
19 hits I felt a pop in like my neck or my ear. I felt
20 a pop and my head got really light-headed and I was
21 kind of like wobbly, a little bit dizzy.

22 During the progression at one point
23 there was an officer -- there was an officer on the
24 other side of the weight cage and he grabbed another
25 officer from somewhere so there were two of them on

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1 the other side. When this beating was going on he
2 was laughing and he told the other officer, go ahead,
3 hit him, hit him. And I rolled my eyes up and looked
4 up and looked straight into the eyes of the officer
5 on the other side. And he hesitated, he stopped and
6 hesitated and he started to back out of the way. And
7 then the other officer goes, no, no, it's okay, it's
8 okay, go ahead, hit him. I kind of like nodded and
9 moved my head back from the cage a little bit and he
10 hit the cage and it rocked me back."

11 Resuming now at page 39, line 19.

12 "Question: So you were on the outside
13 of the cage, you had been struck at least five times
14 in the ear, what happens next?

15 "Answer: Afterwards somebody came
16 walking by and everybody said sush, sush and they all
17 moved away. They all hushed everybody up and they
18 all moved away.

19 Then somebody came up and said -- I
20 think it was a sergeant later, he said so you're the
21 one with the cane in the room. I said yes. He said,
22 well, that cane had a shank in it. And he says, were
23 you aware of that? And I said no, that wasn't my
24 cane. He said, whose cane was it? It was Inmate
25 Robinson's. He said where is he? I said he was

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1 taken to B Unit on the first day of the lockdown. He
2 said, so the cane wasn't yours then? And I said no.

3 And he looked and he says why is your
4 ear all red? And I said I don't know, sir."

5 And he continues at page 41.

6 "Answer: They asked me about my ear
7 and the sergeant asked me about my ear and he said
8 what's wrong with his ear? Why is it red? And the
9 officer said I don't know, ask him. And he asked me,
10 and I said I don't know, sir, it's always been that
11 way. And the officer said, oh, well, you must have
12 been teased when you were a kid. It's always been
13 that way. You must have been teased as a kid. I
14 said, yes, sir. He said, did they call you names? I
15 said, yes, sir. And He said, so what did they call
16 you? And I went, you know -- and I got hit again.
17 And then I said Rudolph the red-eared reindeer, sir,
18 and just made something up. They all laughed and
19 walked away.

20 After the beating, they had brought a
21 couple of other officers over, laughing like after
22 the officer had come and questioned me about the
23 cane. They brought a couple of other officers over
24 laughing and they were like ask him his name, ask him
25 his name. And the first time I said, you know,

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1 Rudolph the red-eared reindeer. After that I didn't
2 want them to start beating me again. And after that
3 I said to them, you know, Inmate Marchetti. And they
4 pretty much left me alone after that."

5 I then asked a question, "Was that in
6 the sergeant's presence or had he moved away at that
7 point?

8 "Answer: I think he was still there.
9 I think he was still there because there was a
10 snicker."

11 Now, I considered the evidence to the
12 contrary in this case including that of Nurse Zadarla
13 who saw Mr. Marchetti approximately two days later.
14 When asked about the presence or absence of redness
15 in the ear she said, well, that would probably have
16 disappeared, but there should have been swelling for
17 at least 72 hours. I can consider that that may well
18 have been in the nature of an average, but I don't
19 think it precludes the possibility that the swelling
20 might have reduced or gone down even in 48 hours or
21 that it might not have been particularly obvious to
22 the nurse, particularly since with officers around
23 Mr. Marchetti was not making any complaints about his
24 ear.

25 There is some contradiction from

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1 Officer Koerner to Mr. Marchetti's recounting of his
2 transport to the infirmary on August 13th. However,
3 I find that any such contradiction is not material to
4 the events in question here.

5 I find that as far as the damages or
6 injuries are concerned that Mr. Marchetti sustained
7 short-term, acute pain and that thereafter he had
8 headaches as a result of this event, but with the
9 assistance of over-the-counter medication, eventually
10 was able to deal with them.

11 As I've often said, I look for indicia
12 of credibility or indicia of support for either one
13 position or another that may not at first blush be
14 readily apparent. Here we have a situation where the
15 SOG officers involved, and of course they were not
16 identified, took advantage of a professed disability,
17 molded it into a failure of Mr. Marchetti to respond
18 to questions tossed out to the gym population as a
19 whole and then proceeded with what can be described
20 only from their point of view as a humorous
21 recreational venture, to belt this man repeatedly in
22 the ear which he said was deficient.

23 They used, of course, the vulgar
24 language for their own amusement with regard to how
25 that hearing deficiency might have occurred. They

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1 gathered around laughing from time to time at the
2 event and I find that the event happened as described
3 by Mr. Marchetti.

4 There have been situations where
5 isolated instances back in the vicinity of the weight
6 cage at the rear of the gym have, as I determined
7 here, gone undetected. We are here on August 11th,
8 some two weeks into the lockdown. There is no
9 indication that senior administrators of the prison
10 were now taking a level of interest in events in the
11 gym that had been present early in the course of this
12 lockdown. These events happened in the middle of the
13 afternoon. And in studying the ombudsmen's reports,
14 it's pretty clear that they were in the middle of a
15 shift change. Those reports are D-108 and D-135 in
16 particular. Hence it is certainly a permissible
17 inference that there was not the level of coverage or
18 close observation from ombudsmen taking place in this
19 gym area at the particular time of day when Mr.
20 Marchetti was assaulted. Furthermore, as he
21 testified and as we've often seen among other things
22 when viewing videotape, these SOG officers are large
23 men, they certainly have the ability and the savvy to
24 stand around in a group or otherwise shield an inmate
25 or anything else from plain view. And that's

1 consistent with his description here. So over the
2 course of a couple of minutes, it is very credible
3 that Mr. Marchetti could have been whacked in the
4 head for this sort of sporting activity by the SOG
5 unit on this occasion.

6 These acts of striking Mr. Marchetti go
7 well beyond the necessity of any proper law
8 enforcement needs or any proper exercise of
9 discipline or any other legitimate penalogical
10 purpose as well defined in the jury instructions
11 which are incorporated here. Even if some measure of
12 discipline might have been imposed on the spot for
13 his failure to respond promptly to the question about
14 a cane in his cell, it certainly had no reason
15 whatsoever to rise to this level, particularly when
16 he was able to offer to them the fact of problems of
17 hearing loss which they considered to be so amusing
18 as to endeavor to inflict further damage on the very
19 ear where that hearing loss existed.

20 There was, indeed, excessive,
21 unnecessary and sadistic force imposed upon Mr.
22 Marchetti within the contemplation of the legal
23 principles to which I have referred above.

24 Furthermore, I find that this is a case
25 that also supports a judgment for punitive damages,

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1 at least against the perpetrators. Whether or not,
2 either through these activities or others, punitive
3 damages will ultimately be assessed against
4 supervisory personnel is a different question and I
5 don't rule on that here. I realize also that the
6 perpetrators here at least at this point remain
7 unidentified which will probably remain the case.
8 The definition coming from the jury instructions
9 which we've employed here and which is most telling,
10 I think, reads as follows, and I quote: "If you find
11 that the defendant's conduct was motivated by evil
12 motive or intent or that the defendants' act engaged
13 in reckless or callous indifferent conduct to the
14 plaintiff's federally protected rights to be free
15 from cruel and unusual punishment, you must consider
16 whether or not to award punitive damages to the
17 plaintiff. Punitive damages are awarded as a
18 punishment of the defendants and as a deterrent to
19 others from following this example."

20 In this instance as described and as I
21 find credible, there was clearly the demonstration of
22 an evil motive and intent on behalf of the SOG
23 officers here to sadistically inflict this
24 punishment.

25 And I move now to the question of the

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1 imposition of damages. I believe as I mentioned
2 before, the injuries to Mr. Marchetti, happily, were
3 not extensive. The prospect of additional damage to
4 that ear, of course, was very real, but apparently it
5 didn't happen. He certainly experienced short-term
6 acute pain and swelling and headaches thereafter for
7 at least some period of time before over-the-counter
8 medication was able to deal with them.

9 Under all of the circumstances here, I
10 find an award of compensatory damages in the sum of
11 \$5,000. As for punitive damages, I'm also mindful of
12 the recent Third Circuit decision in one of the cases
13 which has been taken up on appeal which asks for a
14 consideration, at least to some extent, of a
15 reasonable ratio between punitive damages and
16 compensatory damages. I'm also mindful of the fact
17 that there is nothing in this record that
18 demonstrates at least the financial circumstances of
19 the corrections officers, but I would not consider
20 them to be particularly affluent. Under all of those
21 circumstances, then, I'm recommending to the district
22 court a judgment for punitive damages in this matter
23 in the sum of \$10,000.

24 Finally, although not every item of
25 evidence has been discussed in this opinion/report,

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1 all evidence presented to the Special Master was
2 reviewed and considered. I find that the injury
3 inflicted here was actionable, I find that the injury
4 was acute initially, although happily has not
5 resulted in any permanent injury. I also find as
6 previously indicated that it was the product of an
7 evil motive or intent which, therefore, supports an
8 award of punitive damages.

9 Accordingly, I recommend in this report
10 that the district court enter an award of
11 compensatory damages in the amount of \$5,000 and
12 punitive damages in the amount of \$10,000 in Mr.
13 Marchetti's favor.

14 Thank you.
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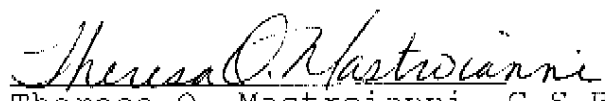
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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.


Theresa O. Mastroianni, C.S.R.
Notary Public, State of New Jersey
My Commission Expires May 5, 2010
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